

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case #

05-30091-KPN

JENETA KELLY, Plaintiff
By her Guardian and next Friend,
GENSIE KWAME,

v.

DAYTONA FUN PARK
G & R GO CART,
RUSTY BERTHOLET, Defendants

PLAINTIFF'S COMPLAINT
AND DEMAND FOR JURY
TRIAL

FILED
IN CLERK'S OFFICE
2005 APR 20 P 2:00
U.S. DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Preliminary Statement

This is an action to recover money damages sustained by Jeneta Kelly, legal ward of Gensie Kwame, as a result of negligence of the Defendants in operating, maintaining and supervising patrons for a ride known as "GURIO" at the amusement park owned and operated by the Defendants. The Defendants acted negligently by failing to properly anchor the ride to the ground, allowing the ride attendant (an employee of the Defendants) to improperly operate the ride, failing to ascertain the proper safety for securing patrons of the ride, failing to maintain the safety restraints for the ride, and the failure of the attendant to respond to the complaints of the patron, Jeneta Kelly, that she was dizzy and uncomfortable.

The Plaintiff contends that the Defendants, acting with their employees and agents, failed to secure, maintain and supervise the ride at their amusement park known

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as "GURIO". As a result of these failures on the part of the Defendants, the Plaintiff's ward, Jeneta Kelly, was thrown from the ride, was injured and suffered physical damages, emotional distress and other related trauma.

Parties

1. Gensie Kwame is the grandmother and legal guardian of Jeneta Kelly, a 17 year old minor (hereinafter referred to as the "ward"), with a usual address of 13 Harvard Street, Springfield, Massachusetts 01109.
2. Daytona Fun Park G & R Go Cart is an amusement park with a usual address of Rural Route 118, Laconia, New Hampshire 03246.
3. Rusty Bertholet is upon information and belief, the owner of the amusement park described in paragraph 2 above, with a usual place of residence at 48 Lucerne Avenue, Laconia, NH 03246.

Jurisdiction and Venue

4. This Court, based upon the total of citizenship of the parties herein, has diversity jurisdiction over the action pursuant to 28 U.S.C. §1332(a)(1). The amount in controversy between the Plaintiff and the Defendants exceeds, exclusive of interest and costs, the sum of \$75,000.00.
5. Venue is appropriate within the District of Massachusetts pursuant to 28 U.S.C. §1391(a).

Factual Background

6. On or about August 13, 2003, the Plaintiff and her ward, Jeneta Kelly was a patron at the Defendant amusement park, Daytona Fun Park G & R Go Cart, along with her sister and cousin.
7. The ward's cousin and sister rode the ride prior to the ward.
8. During their ride the ward's sister was thrown so violently that she hit her head on a part of the ride.
9. The ward then entered the ride and was secured by a single strap around her waist and adjustable foot restraints.
10. When the ward was on the ride, the ward's sister observed the ride lift from the ground and heard a noise when that happened.
11. During her ride, the ward was thrown violently from side to side.
12. At the completion of her ride, the ward was asked by the attendant if she wanted to ride again.
13. The ward said yes, but asked that the ride be slower as she was experiencing dizziness on the last ride.
14. During the second ride, the ward recalls that she was flung violently from the ride, leaving the unit in which she was riding and found herself on the ground.
15. Upon regaining her senses, the ward observed her teeth on the ground and was unaware that her jaw was broken and that she was bleeding.
16. The Plaintiff then took the ward away from the park and sought medical assistance at a local hospital.

17. On or about August 19, 2003, the Plaintiff received three (3) whole teeth and one broken tooth from the emergency room at the hospital in New Hampshire where the ward was treated.
18. The Plaintiff then sought and obtained services from an oral surgeon to assist the ward in her recovery.

Count I – Negligent Supervision

19. The Plaintiff restates paragraphs 1 through 18 inclusive, as if set forth herein.
20. The Defendants were obligated to properly and safely secure the ward in the ride equipment.
21. The Defendants' agents failed to properly supervise the ride attendant to insure the proper safety of ride patrons was effected.
22. The actions of the ride attendant, in failing to properly secure the ward in the ride unit resulted in injuries to her person.
23. As a direct result of the Defendant's failure, the ward was thrown from the ride and was injured.
24. The ward lost four teeth and required extensive oral surgery as a direct result of her injuries.
25. The medical bills to date for the ward exceed \$10,000.00 and the additional future medical expenses that are reasonably likely, pursuant to advice of the ward's oral surgeon and consulting medical providers, will exceed \$70,000.00.

WHEREFORE the Plaintiff demands judgment against the Defendants together with interest and costs thereon, reasonable attorney's fees and such additional relief as this Court may deem proper.

Count II – Negligent Maintenance

26. The Plaintiff restates paragraphs 1 through 25 inclusive, as if set forth herein.

27. The Defendants were obligated to maintain the ride equipment in a safe and proper working manner.

28. Upon information and belief, the Defendants knew or should have known that the ride equipment was not properly functioning when the ward was a patron on the ride.

29. The Defendants failed to properly maintain the ride equipment in a safe and proper working manner resulting in injuries to the ward.

WHEREFORE the Plaintiff demands judgment against the Defendants together with interest and costs thereon, reasonable attorney's fees and such additional relief as this Court may deem proper.

Count III – Negligent Infliction of Emotional Distress

30. The Plaintiff restates paragraphs 1 through 29 inclusive, as if set forth herein.

31. The ward made the Defendants' agent aware of the effects of the ride upon her physical and emotional well-being.

32. Despite the ward's advice, the Defendants' agents continued to increase the speed of the ride, and the orientation of the ward's ride unit, spinning it around against the ward's request.

33. As a result of the Defendant's agent's actions, the ward was thrown from the ride and smashed into the ride framework suffering injuries and emotional distress.

WHEREFORE the Plaintiff demands judgment against the Defendants together with interest and costs thereon, reasonable attorney's fees and such additional relief as this Court may deem proper.

Count IV- Negligence

34. The Plaintiff restates paragraphs 1 through 33 inclusive, as if set forth herein.

35. The Defendants owed the Plaintiff and her ward a duty to maintain, supervise and reasonably keep the premises and all rides thereon safe and properly maintained.

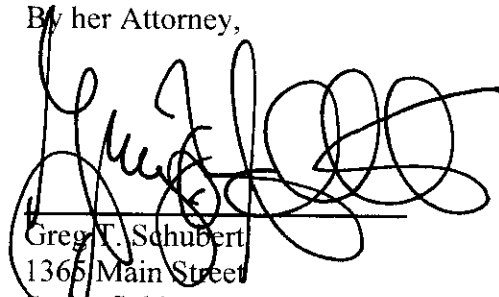
36. The Defendants failed to maintain, supervise and reasonably keep the premises, and all rides thereon, safe and properly maintained.

37. As a direct result of the Defendant's failure, the Plaintiff's ward suffered injuries and damages.

WHEREFORE the Plaintiff demands judgment against the Defendants together with interest and costs thereon, reasonable attorney's fees and such additional relief as this Court may deem proper.

**PLAINTIFF CLAIMS TRIAL BY JURY ON ALL COUNTS APPLICABLE
HEREIN.**

The Plaintiff,
By her Attorney,

A handwritten signature in black ink, appearing to read 'Greg T. Schubert', is written over a horizontal line. The signature is stylized with large loops and flourishes.

Greg T. Schubert
1365 Main Street
Springfield, Mass. 01103
Telephone: (413) 746-1313
FAX: (413) 746-3102
BBO # 447340

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
Jeneta Kelly, By her Guardian and
next friend, Gensie Kwame

(b) County of Residence of First Listed Plaintiff Hampden
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number) 413-746-1313
Greg T Schubert, Counsellor At Law
1365 Main St., Springfield, MA 01103

DEFENDANTS Daytona Fun Park
G & R Go Cart,
Rusty Bertholet

County of Residence of First Listed Defendant Belknap
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

Attorneys (If Known) 617-425-3900
Michael Chefitz, ESq
Bonner, Kierman, Trebach & Crociata
One Liberty Square, Boston, MA 02109

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- PTF DEF**
Citizen of This State ☒ 1 ☐ 1 Incorporated or Principal Place of Business in This State ☐ 4 ☐ 4
Citizen of Another State ☐ 2 ☒ 2 Incorporated and Principal Place of Business in Another State ☐ 5 ☐ 5
Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS- Third Party 26 USC 7609
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influence and Corrupt Organization <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Act ons <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Brief description of cause:

Tortious personal injury / Diversity Jurisdiction 28 U.S.C. 1332

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

\$75,000.00

CHECK YES only if demanded in complaint: (a) (1)
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

305920

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. Title of case (name of first party on each side only) Jeneta Kelly v. Daytona Fun Park
2. Category in which the case belongs based upon the numbered nature of suit code listed on the civil cover sheet. (See local rule 40.1(a)(1)).
- | | | | |
|--------------|------|---|--|
| <u> </u> | I. | 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT. | |
| <u> </u> | II. | 195, 368, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950. | *Also complete AO 120 or AO 121 for patent, trademark or copyright cases |
| <u> X </u> | III. | 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891. | |
| <u> </u> | IV. | 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900. | |
| <u> </u> | V. | 150, 152, 153. | |
3. Title and number, if any, of related cases. (See local rule 40.1(g)). If more than one prior related case has been filed in this district please indicate the title and number of the first filed case in this court.
-
4. Has a prior action between the same parties and based on the same claim ever been filed in this court?
- YES ☐ NO ☐
5. Does the complaint in this case question the constitutionality of an act of congress affecting the public interest? (See 28 USC §2403)
- YES ☐ NO ☒
- If so, is the U.S.A. or an officer, agent or employee of the U.S. a party?
- YES ☐ NO ☒
6. Is this case required to be heard and determined by a district court of three judges pursuant to title 28 USC §2284?
- YES ☐ NO ☒
7. Do all of the parties in this action, excluding governmental agencies of the united states and the Commonwealth of Massachusetts ("governmental agencies"), residing in Massachusetts reside in the same division? - (See Local Rule 40.1(d)).
- YES ☐ NO ☒
- A. If yes, in which division do all of the non-governmental parties reside?
- Eastern Division ☐ Central Division ☐ Western Division ☐
- B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?
- Eastern Division ☐ Central Division ☐ Western Division ☒
8. If filing a Notice of Removal - are there any motions pending in the state court requiring the attention of this Court? (If yes, submit a separate sheet identifying the motions)
- YES ☐ NO ☒

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Greg T Schubert, Counsellor At LawADDRESS 1365 Main Street, Springfield, MA 01103TELEPHONE NO. 1(413) 746-1313